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DIRECTING A VERDICT FOR THE PARTY HAVING THE BURDEN OF PROOF.

THE practice of moving for a directed verdict is the modern substitute for the old demurrer to the evidence. The reason for its development at the expense of the older procedure is not far to seek. The demurrer to the evidence was in the first place cumbersome and difficult to draw, for it was required to contain a full written recital of all the facts shown in evidence by the opposite party, together with all reasonable inferences favorable to the party who introduced the evidence.¹ The preparation of such a demurrer usually required the expenditure of much time and labor.

In the next place the filing of a demurrer to the evidence was an absolute, final and irrevocable withdrawal of the case from the jury, which resulted necessarily in a final judgment on the merits for one party or the other. If the demurrant succeeded in having his demurrer sustained he got a final judgment in his favor, but if he failed on his demurrer final judgment went against him, without his having an opportunity to present the merits of his case.² It resulted from this that parties who had meritorious defences hesitated to risk everything on such a demurrer, and the practice of employing it fell into disuse.³

The motion for a directed verdict is free from both of these serious drawbacks. It is made orally at the trial, and is based on the evidence as preserved in the memory of the judge and in the stenographer's minutes. In case the motion is sustained final judgment results from the verdict rendered under the court's direction, and this judgment is on the merits. But if the motion is overruled the moving party is simply left where he was when he made the motion, and he is free to go on with the case and seek a verdict from the jury. He therefore has much to gain and nothing to lose by employing it.⁴

One feature of the demurrer to the evidence becomes important in connection with the present inquiry. It was an invariable rule that the demurrer could be employed only by the party who did not carry the burden of proof. Sometimes it was used by the plaintiff, sometimes by the defendant,⁵ but "the party upon whom the burden

¹ *Copeland v. New England Ins. Co.*, 22 Pick. (Mass.) 135.

² *Galveston, Harrisburg & San Antonio Ry. Co. v. Templeton*, 87 Texas 42.

³ *Copeland v. New England Ins. Co.*, 22 Pick. (Mass.) 135.

⁴ *Eberstadt v. State*, 92 Texas, 94.

⁵ *Fritz v. Clark*, 80 Ind. 591.

of proof of the issue rests is not permitted to demur to the evidence of the other, for he cannot be allowed to assume that he has made out his case."⁶

In *Gibson v. Hunter*,⁷ the leading case on demurrers to evidence, Lord Chief Justice EYRE thus stated the law in the House of Lords: "It is a proceeding, by which the Judges, whose province it is to answer all questions of law, are called upon to declare, what the law is upon the facts shown in evidence, analogous to the demurrer upon facts alleged in pleading. * * * My Lords, in the first stage of that process, under which facts are ascertained, the Judge decides, whether the evidence offered conduces to the proof of the fact, which is to be ascertained; and there is an appeal from his judgment by a bill of exceptions. The admissibility of the evidence being established, the question *how far* it conduces to the proof of the fact which is to be ascertained, is not for the Judge to decide, but for the jury exclusively; with which Judges interfere in no case. * * * When the jury have ascertained the fact, if a question arises wherein the fact thus ascertained maintains the issue joined between the parties, or in other words, whether the law arising upon the fact; (the question of law involved in the issue depending upon the true state of the fact) is in favor of one or other of the parties, that question is for the Judge to decide. Ordinarily he declares to the jury that the law is upon the fact which they find, and then they compound their verdict of the law and fact thus ascertained. But if the party wishes to withdraw from the jury, the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence, and the precise operation upon that demurrer is, to take from the jury and to refer to the Judge the application of the law to the fact. In the nature of things therefore, and reasoning by analogy to other demurrers, and having regard to the distinct function of Judges and of Juries, and attending to the state of the proceeding in which the demurrer takes place, the fact is to be first ascertained."

Now if the facts must be first ascertained, there is just one way in which it can be done without recourse to the jury—such recourse being the thing which it is desired to avoid—and that is by agreement of the parties. Such an agreement can arise only through the admission of the party against whom a fact is sought to be proved, that it has been sufficiently established. No one can admit that his own case has been satisfactorily made out—he can only admit the case of his opponent. And since the party who holds the burden of

⁶ *Pickel v. Isgrigg*, 6 Fed. 676.

⁷ 2 H. Blackstone 187, at page 205.

proof is the only one who has the affirmative case to prove, the other party is the only one who can, by admitting all the facts which his opponent's evidence tends to establish, being about such an ascertainment of the facts as will permit the judge to take the case from the jury and to declare the law arising upon such facts.

Viewing the motion for a directed verdict as a simplified and summary form of demurrer to the evidence, it is clear that in order to withdraw a case from the jury and submit it to the court, the parties must in some way agree upon the facts, and this will require the admission of the party not carrying the burden of proof, that his opponent has sufficiently established all facts which his evidence tends to prove. He does this merely by making the motion that a verdict be directed in his favor, such action being the legal equivalent of the written admission contained in the demurrer to the evidence.

The only admission of the facts disclosed by the evidence which the practice relative to demurrers recognized, was the express, formal admission spread at large upon the record, like the admission in an answer in equity.⁸ The admission recognized by the practice of moving for a directed verdict, made by the party not carrying the burden of proof, is equally express, but informal and not spread at large upon the record. An express admission must be the affirmative act of the party against whom the evidence is offered, hence in both these forms of withdrawing the case from the jury, if an express admission is necessary, the practice must be initiated by the party who does not carry the burden of proof.

But is an express admission really necessary in order to ascertain the facts? In pleading it has always been deemed sufficient, to constitute an admission of an averment, that the other party did not deny it. Implied admission by failure to deny is the full legal equivalent of an express admission spread upon the record. Statutes, which but reiterate the common law rule, so declare in half the states.⁹ And courts show no hesitation in rendering final judgment on the merits of the case because, forsooth, the defendant, by failure to deny, has admitted the plaintiff's case.¹⁰

Transferring this doctrine from the pleadings over to the evidence, and applying it in its true sense and meaning, there appears to be no reason why a party, who fails to deny by his own evidence any part of the case made against him by his opponent's proof, does not thereby admit the truth of such evidence and such conclusions as naturally and reasonably flow therefrom. On account of the greater

⁸ *Copeland v. New England Ins. Co.*, 22 Pick. (Mass.) 135.

⁹ This is a familiar provision in American Codes of Civil Procedure.

¹⁰ *Cobb v. Wm. Kenefick Co.*, 23 Okla. 440.

prolixity and variety of the evidence, as compared with the pleadings, it is probably a more difficult matter to determine whether, as to any given fact shown in evidence, the other party has really failed to controvert it and has thereby stamped it with the approval of an implied admission. But if it be conceded that any fact does in truth stand absolutely uncontroverted, the conclusion seems sound and it thereby stands admitted.

Now such an admission, being merely implied from the want of evidence to the contrary, requires no affirmative action on the part of him who makes it. It is made by what he fails to do, not by what he does. Hence it may be said to assume independent self-existence in the course of the trial of the cause. Unlike an express admission, which is created only by the voluntary act of him who wishes to make it for his own benefit, an implied admission arises in spite of the utmost efforts to avoid it. It is not made, but suffered; not chosen, but endured. It stands forth in the case for what it is worth. Why should it not be available to any party who can use it?

Many modern cases hold that such an implied admission is available to the other party, and that it is *possible* for a party who holds the burden of proof to avail himself of such admission as a basis for requesting an instructed verdict in his favor. According to these cases, therefore, the demurrer to the evidence and the motion for a directed verdict part company at this point, one being available to the party who does not carry his burden of proof, the other being available to either party. But there are other cases which announce a different rule, and even among those authorities which permit the broader practice, there are various limitations upon the application of the doctrine which render it confused and difficult to understand.

There are at least three different classes of cases to be found upon this subject.

Class 1. Cases which hold that the party carrying the burden of proof cannot avail himself of a motion for a directed verdict in his favor. These are almost all expressly grounded upon the proposition that a fact cannot be assumed to be proved merely because there is uncontroverted evidence in support of it, for the reason that there are two elements present in all evidence, namely, the facts shown and the credibility of the witnesses who testify to them. Although no issue be raised upon the facts directly, through failure to deny, yet this cannot be deemed an admission that the witnesses who so testified are worthy of belief.

This doctrine is expressed in forcible language by the Supreme

Court of Michigan, in *Woodin v. Durfee*,¹¹ as follows: "A jury may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment." And in *Charleston Insurance & Trust Co. v. Corner*,¹² the Supreme Court of Maryland was equally outspoken in announcing the same rule, saying: "The instructions asked by the appellee, who was plaintiff below, were not based on an assumed state of facts, to be submitted to the consideration of the jury. They were moved, it would seem, in the confidence, that as the evidence was uncontradicted, the jury could not do otherwise than find the facts accordingly. . . . Doubtless the jury would have found these facts according to the testimony, but the sufficiency of the evidence to satisfy the jury, or the circumstance, that it is all on one side, does not authorize the court to direct the jury, that it proves the fact. They have the power to refuse their credit, and no action of the court should control the exercise of their admitted right, to weigh the credibility of evidence."

The language in a considerable number of cases is equally strong. Thus in *Lindenbaum v. New York, New Haven & Hartford R. R. Co.*,¹³ the Massachusetts court recently said: "The difficulty with the argument in support of the exception to the refusal of the judge to direct a verdict for the Union Freight Railroad Company is that although there was no evidence directly contradicting the account of the accident given by their witnesses, the jury had a right to disbelieve their testimony *in toto*." So in *Anniston Nat. Bank v. School Committee*,¹⁴ the Supreme Court of North Carolina said: "If the party upon whom the burden of proof rests has offered no evidence to prove the issue, or no such evidence as the jury ought to find a verdict upon (as in *Witkowski v. Wasson*, 71 N. C. 451), the court should say so, and direct a finding in the negative, *State v. Shule*, 32 N. C. 153. But no matter how strong and uncontradictory the evidence is in support of the issue, the court cannot withdraw such issue from the jury and direct an affirmative finding. To do this is to violate the Act of 1796, Section 413 of The Code."

But in most cases where this broad and absolute rule finds expression, it appears that the court probably had no intention of going so far, but declared the rule in general terms in the light of the particular facts presented. In substantially all of the cases which

¹¹ 46 Mich. 424.

¹² 2 Gill (Md.) 410, at page 426.

¹³ 197 Mass. 314.

¹⁴ 121 N. C. 107.

state this general rule, the evidence was, at least in part, oral evidence. And it is certain that some, and probably all of these cases should properly be classified under Class 2, as described below, thus making Class 1 a mere ostensible class.

Class 2. Cases holding that the party carrying the burden of proof cannot obtain the direction of a verdict in his favor when his case rests in whole or in part upon oral evidence, but that such a direction may be based upon written evidence.

The Supreme Judicial Court of Massachusetts, quoted above as laying down the general rule against permitting a directed verdict in favor of the party having the burden of proof, explains its position more clearly in *Giles v. Giles*,¹⁵ in the following language: "While the jury, upon the facts, could not have been expected to reach any other conclusion than that which was recorded under the direction of the court, the issue was one to be passed upon by a jury, which is the ordinary tribunal for the determination of questions of fact. When a proposition is only to be established by the testimony of witnesses, the judge cannot properly direct a jury to decide that the fact is provided affirmatively by testimony. It is for the jury to say whether the witnesses are entitled to credit.

"We know of no case in this commonwealth in which it has been determined that a jury can be directed to return a verdict, upon the oral testimony of witnesses, in favor of a party who has the burden of proving the facts to which they have testified."

That the court was prepared to stand by the doctrine implied in this language and sustain a directed verdict in favor of one whose case rested upon written evidence, appears from *Goldstein v. D'Arcy*,¹⁶ which was a suit upon a contract in writing wherein the plaintiff had the burden of proof, and the court held that, plaintiff's evidence being undisputed, a verdict was properly directed for the plaintiff.

This distinction between written and oral evidence is made in a large number of cases. In *Perkiomen Railroad Co. v. Kremer*,¹⁷ the Pennsylvania Supreme Court said: "'However clear and indisputable may be the proof, when it depends upon oral testimony, it is nevertheless the province of the jury to decide under instructions from the court as to the law applicable to the facts, and subject to the statutory power of the court to award a new trial if they should deem the verdict contrary to the weight of evidence': *Reel v. Elder*, 62 Pa. St. 308."

¹⁵ 204 Mass. 383.

¹⁶ 201 Mass. 312.

¹⁷ 218 Pa. St. 641.

In *Fowler Utilities Co. v. Chaffin Coal Co.*,¹⁸ the Appellate Court of Indiana said that if a certain telegram was not a part of the contract, then parol evidence of the meaning of the term "cars" was admissible, and in that case "the motion to direct a verdict for appellee was improperly sustained, for in such event the verdict would be based in part upon oral testimony." And the same court in *Stephens v. American Car & Foundry Co.*,¹⁹ declared that "a request on behalf of the party having the burden of the issue on a trial, for direction to the jury to return a verdict in his favor, should not be granted when the verdict must be based upon the testimony of witnesses, wholly or partially."

So far has this been carried that in *Johnson v. Grayson*²⁰ the Supreme Court of Missouri held that "where allegations in the petition are denied by the answer, and oral evidence is introduced by the plaintiff to sustain the issues on his part, the defendant is entitled to have the jury pass upon the evidence, though he offer no evidence at all."

There are many cases in which directed verdicts have been refused at the request of the party having the burden of the issue, where the evidence introduced was in fact oral in whole or in part, though the court made no special mention of the distinction between oral and written proof; but there are also many cases in which directed verdicts in favor of such a party have been upheld where the evidence was in fact largely documentary, though the distinction under discussion has not been expressly pointed out. Cases of the latter sort are illustrated by *Hendrick v. Lindsay*,²¹ which was an action on an indemnity bond; *Friedline v. State*,²² which was a suit on a recognizance; *Coskery v. Wood*,²³ and *Gaff v. Greer*,²⁴ in both of which the evidence was documentary; *Marshall v. Grosse Clothing Co.*,²⁵ which was an action on a written lease, and *McCormick v. Holmes*,²⁶ which was an action on a note.

Class 3. Cases in which it has been held that a verdict may be directed in favor of the party having the burden of the issue irrespective of the character of the evidence.

In *Woodstock v. Canton*,²⁷ there was an issue as to a pauper

¹⁸ 43 Ind. App. 438.

¹⁹ 38 Ind. App. 414.

²⁰ 230 Mo. 380.

²¹ 93 U. S. 143.

²² 93 Ind. 366.

²³ 52 S. C. 516.

²⁴ 88 Ind. 122.

²⁵ 184 Ill. 421.

²⁶ 41 Kan. 265.

²⁷ 91 Me. 62.

settlement, supported by parol evidence, on which a verdict was directed for the plaintiff who had the burden of the issue. The court said: "The evidence would not authorize a verdict for defendant. In such case, the presiding judge may order a verdict. This court said in *Heath v. Jaquith*, 68 Maine, 438, 'It would be but an idle ceremony to submit the case to the jury upon instructions authorizing them to find for a party, when he has introduced no evidence which would authorize it; and when, if they find a verdict in his favor, it would be the duty of the court to set it aside because there was no evidence sufficient to support it'."

In *Chanute v. Higgins*,²⁸ the Supreme Court of Kansas approved an instructed verdict for the plaintiff upon whom rested the burden of proof in a personal injury case, on the ground that the facts shown by the plaintiff were uncontroverted and only one conclusion could reasonably be drawn therefrom.

In *May v. Crawford*,²⁹ where plaintiff who had the burden of the issue supported it by oral testimony of breach of contract, the Supreme Court of Missouri said: "If there had been any conflict in the testimony as to the breach, it would have been proper to submit it to the jury as a question of fact, but here there was no conflict of testimony, no countervailing evidence, and no impeachment of any witness. It was error, therefore, for the court to submit the matter as a question of fact to the jury." And in pursuance of the same rule the Court of Appeals of that state sustained the direction of a verdict for the plaintiff, who had the burden of proof, on oral evidence in an action for breach of contract to pay commissions, saying: "Plaintiff contends the trial court properly directed a verdict, since the evidence was uncontroverted, in any way, that he was entitled to recover the amount of the contract price, to-wit, five dollars per acre, for producing the purchaser. If the plaintiff is correct in his view of the evidence he was entitled to the instruction."³⁰

So in the recent case of *Webber v. Axtell*,³¹ where the plaintiff supported the issue with parol evidence as to the existence of a bar in Fox Lake and as to estoppel, a verdict, directed in his favor was sustained, the Supreme Court of Minnesota saying: "There was no conflict in the evidence, either upon the question of the existence of the bar connecting the island with plaintiff's land, or in respect to the alleged estoppel, and the trial court properly treated it as

²⁸ 65 Kan. 680.

²⁹ 150 Mo. 504, 527.

³⁰ *Crawford v. Stayton*, 131 Mo. App. 263. Compare these two Missouri cases with *Johnson v. Grayson*, supra. They can hardly be reconciled.

³¹ 110 Minn. 52.

presenting questions of law only. Had the cause been submitted to the jury, and a verdict been returned for defendant, the trial court would have been required, under the former decision, to set it aside or direct a judgment notwithstanding the same. Such being the case, a verdict was properly directed."

Numerous cases state the rule no less broadly, to the effect that when there is no controversy raised as to the evidence introduced in support of the burden of proof, there is nothing to be submitted to the jury, and a directed verdict is proper. Among these may be cited *Green v. Stewart*³² in the District of Columbia, *Clancy v. Reis*³³ in Washington, *Israel v. Day*³⁴ in Colorado, *McCleskey v. Howell Cotton Co.*³⁵ in Alabama, *Shumate v. Ryan*³⁶ in Georgia, and *Harding v. Roman Catholic Church*³⁷ in New York.

It is difficult to justify the doctrine that there is any such difference between cases based on written evidence and those based on parol evidence, as will require the application of different principles in dealing with requests for instructed verdicts. As a fact, documentary evidence must rest upon oral testimony for its genuineness and authenticity, so that if it is the presence of parol evidence materially vital to the support of the issue which necessarily compels a submission to the jury, then the right to a directed verdict in behalf of one having the burden of proof becomes a mere theoretical right, seldom if ever to be realized.

The basic principle underlying the cases which deny the court the right to instruct the jury in favor of the party having the burden of proof, is, as already indicated, that the jury has the right to disbelieve all the witnesses even though the facts to which they testify are uncontroverted and inherently credible, and the witnesses unimpeached. Why the jury should be given any such license it is hard to understand. Juries cannot be permitted to exercise blind and unreasoning power to oppress litigants. They must conduct themselves as sensible and reasonable men. They cannot be suffered to base verdicts on caprice, conjecture, passion or prejudice.

This view was forcibly expressed by the Supreme Court of New York in *Seibert v. Erie Railway Co.*³⁸ in the following language: "The testimony of these two witnesses is clear, positive and circumstantial; they could not be mistaken. Their testimony is true,

³² 23 App. Cas. 570.

³³ 5 Wash. 371.

³⁴ 41 Colo. 52.

³⁵ 147 Ala. 573.

³⁶ 127 Ga. 118.

³⁷ 113 App. Div. 685.

³⁸ 49 Barb. 586.

or they both committed wilful and corrupt perjury. I think this jury, so far as anything to the contrary appears in this case, were bound to give credit to their testimony. It was not contradicted; it was really no contradiction for the plaintiff to say he did not hear the whistle or bell. They were not impeached, or in any way discredited. The positive testimony of an unimpeached, uncontradicted, witness cannot be discredited, or disregarded arbitrarily or capriciously by court or jury. *Lomer v. Meeker*, 25 N. Y. 361. If juries are permitted to discredit or disregard such testimony, there is no safety in the administration of justice, and parties might just as well let the result of a litigation abide the cast of a die, or a game of chance. It belongs to a jury, I admit, in considering the weight of evidence, to pass upon the credit due to the respective witnesses; but this does not imply that they may, without reasonable or justifiable ground, disbelieve any witness. They have no right to discredit an unimpeached, uncontradicted witness, who testifies fairly, and gives clear, rational, consistent and relevant testimony."

Equally strong language was used by the Supreme Court of Alabama in *Crawford v. The State*,³⁹ where the court said: "If the testimony delivered upon the trial is unimpeached, either by the manner of the witness, his knowledge of the facts, his connection with the parties or by contradictions, or for some other legal reason, the jury must treat it as true. * * * Any other course would imperil the fairness and impartiality of the trial."

Judge MARSHALL, in a dissenting opinion in the case of *Gannon v. Laclede Gas Light Co.*,⁴⁰ in discussing the very question which is the subject of this article, summed up the matter as follows: "Juries try *questions* of fact; that is, controversies about facts. Where there is no controversy, meaning an affirmance of a fact on one side and a denial on the other, there is no *question* as to the facts. If the facts are shown by competent evidence on one side, and the evidence is not contradicted on the other, and there is no attempt to impeach the witnesses, there is no *question* of fact involved in the case, but a simple question of law is presented. To permit a jury to say that it will not believe competent, uncontradicted and unimpeached testimony, and to return a verdict in the teeth of such evidence, is to give the jury plenary power to take a man's life or property as caprice or willfulness may dictate. If this is the power of a jury in this State, then courts are unnecessary, and the study of the law a waste of time, for what shall it profit us

³⁹ 44 Ala. 382.

⁴⁰ 145 Mo. 502, 549.

to carefully sift the grain of competent testimony from the bushel of chaff of hearsay testimony, if after it is all done, the jury can capriciously, arbitrarily, perhaps wantonly, say, 'We don't believe it,' and find for the litigant who has introduced no testimony and has not impeached the testimony that has been introduced. Briefly, bluntly, I say this is not the law."

While it seems to the writer that the foregoing quotations regarding the power of the jury are based on sound notions of its real function, and while the principles so announced seem entirely adequate to sustain the doctrine that a verdict in favor of the party having the burden of proof may be directed upon uncontradicted and unimpeached testimony, that doctrine may still be sustained, as suggested in an earlier part of this article, without resorting to the question of the power of juries, but wholly on the strength of the doctrine of implied admissions. If a party against whom a case is sought to be made wishes to contest it, he is permitted to do so in either or both of two ways, namely, by controverting the facts and by impeaching or discrediting the witnesses. If he fails to controvert the facts he should be deemed to admit them; and if he fails to impeach the witnesses he should similarly be held to admit their credibility. He is free to deny if he wishes. If he does not care to do so, is it any hardship upon him to hold that by failing to take issue on either the facts or the credibility of the witnesses he has conceded both?

If the failure to deny or impeach be viewed in the light of an implied admission, then the question of the jury's power assumes a somewhat different form, namely, Has the jury the power to consider matters which are not in issue in the case? There can be no dispute on such a question. From the earliest times parties have pleaded by confession and avoidance, the confession being solely an implied admission arising from a failure to deny, and no one has ever doubted but that as to all matters so confessed on the pleadings there was nothing to be presented to the jury. And it is hard to see why a failure to deny facts shown in evidence or to contest the asserted credibility of witnesses, should not on principle equally withdraw such matters from the field of controversy.

It may be conceded that an altogether different question arises when it is sought to show that in a particular case no controverting evidence was in fact given and no evidence tending to discredit the witnesses. The common test for directing a verdict is that stated by the Supreme Court of Minnesota in *Webber v. Axtell*, in the quotations given above, that if a verdict for one party would, if given, necessarily be set aside by the court as contrary to the evi-

dence, then a verdict for the other party should be peremptorily ordered by the court. This rule which is adhered to in most jurisdictions where the *scintilla* doctrine does not obtain,⁴¹ is usually invoked *against* the party having the burden of proof, but if the reasoning employed herein is sound it should be equally available *in favor* of the party who carries the burden of the issue.

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⁴¹ See for an excellent discussion of this subject, Meyer v. Houck, 85 Iowa 319.